Filed 11/29/16 P. v. Medel CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICKY TIBOR MEDEL, Defendant and Appellant.	E062247 (Super.Ct.No. RIF1207419) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed with directions.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Ricky Tibor Medel guilty of (1) attempted voluntary manslaughter (Pen. Code, §§ 192, subd. (a), 664);[1] (2) assault with a deadly weapon (§ 245, subd. (a)(1)); and (3) being a felon in possession of a firearm (§ 29800, subd. (a)(1)). The jury found true the allegations that (1) defendant personally used a knife during the attempted manslaughter (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)); and (2) defendant personally inflicted great bodily injury on the victim during the attempted manslaughter and assault (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)).

Defendant admitted suffering (1) three prior strike convictions (§§ 667, subds (c)&(e)(2)(A), 1170.12, subd. (c)(2)(A)); (2) a prior serious felony conviction (§ 667, subd. (a)); and (3) a prison prior (§ 667.5, subd. (b)). The trial court granted defendant's *Romero*[2] motion as to two of his prior strike convictions. The court struck the two enhancements related to the assault conviction. The trial court sentenced defendant to prison for 22 years four months.

Defendant raises four issues on appeal. First, defendant contends the trial court erred by excluding defendant's admission to police that there were weapons in the vehicle. Second, defendant asserts the trial court incorrectly instructed the jury on the standard of proof related to the defense of momentary possession of a firearm. Third, in the alternative, defendant contends that if he forfeited the foregoing two issues by failing to raise them in the trial court, then his trial counsel rendered ineffective

---

[1] All subsequent statutory references will be to the Penal Code unless otherwise indicated.

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

assistance. Fourth, defendant asserts the trial court erred by not staying the assault sentence (§ 654). The People concede defendant's fourth contention is correct. We affirm the judgment with directions.

FACTUAL AND PROCEDURAL HISTORY

On the night of June 7, 2012, the victim went to a bar in Corona. The victim went to the bar with his sister, his fiancée, and his former brother-in-law. Approximately 10 minutes after the victim arrived at the bar, defendant entered the bar with his nephew, Eddy Sulpacio, and the mother of Sulpacio's child, Stephanie Karandos; they traveled to the bar in defendant's car and were celebrating the impending birth of defendant's child. Two of Sulpacio's friends were also at the bar—Juan Quezada and Brandon Delannoy.

Defendant, Sulpacio, and Karandos played pool at the bar. Sulpacio "had had problems" with two men who were also at the bar. Sulpacio's pool game was interrupted two or three times so Sulpacio and those two men could confront one another. At one point, Sulpacio said to one of the men, "'I'm just trying to play pool.'" The man then punched Sulpacio's face. Sulpacio fell to the floor, but eventually stood up.

Sulpacio took a gun out of his pocket and pointed it at the man who punched him. Sulpacio pulled the trigger, but the gun jammed. The victim saw the gun and rushed toward Sulpacio in order to "take him down" and disarm him because Sulpacio was threatening the lives of the victim's sister, fiancée, and ex-brother-in-law who were standing in the general vicinity of where the gun was pointed. People in the bar yelled,

"[G]un," and people "scattered." Sulpacio racked the slide on the semi-automatic gun, pointed it at the victim's chest, and pulled the trigger. The gun jammed again.

The victim hit the side of Sulpacio's head. Sulpacio fell to the ground. The victim continued hitting Sulpacio so that Sulpacio would stay on the ground and not shoot the gun. Sulpacio struck the victim's head with the gun, and they continued to exchange blows. As the two fought, there was commotion in the bar as people were rushing outside. The fight between Sulpacio and victim moved outside, and other people joined the fight. Four people, including defendant, struck the victim.

Karandos arrived at the driver's side of defendant's car, which was parked within 50 feet of where the fight was taking place. Defendant said, "'I got to get out of here.'" Karandos responded, "'We've got to get [Sulpacio].'" Defendant instructed Karandos to get in the car. Karandos complied, sat in the driver's seat, and started the car. Defendant said, "'Get me out of here. Get me out of here.'" Karandos refused to leave without Sulpacio. Defendant said, "'Just back up. Just back up.'"

In the midst of the fight, the gun was transferred to at least one other person's hand, and was ultimately "kicked out of the circle" of people. The gun came to a stop near a dumpster. Delannoy saw Sulpacio's gun on the ground, picked it up, and gave it to defendant while Karandos was trying to back the car out of the parking space.

Delannoy told defendant, "I'm going back for [Sulpacio]." As Karandos drove in reverse, she saw Sulpacio, being chased, running toward the car. Sulpacio entered the car's backseat. As the car was stopped in the bar's driveway, Quezada, who was being chased, ran to the car and entered the back seat.

Karandos drove the car away from the bar. Defendant was holding a knife while inside the car. Defendant said, "'I stabbed that fool three times.'" Defendant tucked the gun between the driver's seat and the center console in order to hide it. Karandos drove for approximately two minutes before she was stopped by police. Police found the gun tucked next to the passenger's seat, and found the knife inside the pocket of the front passenger door.

DISCUSSION

A. EXCLUSION OF EVIDENCE

1. *PROCEDURAL HISTORY*

California Highway Patrol Officer Philip Rogers was cross-examined by defense counsel. During the cross-examination, the following exchange occurred:

"[Defense Counsel]: And to hear [defendant] say to the officers—I don't know if it's you or a Corona police officer—there's a gun and knife in a car—

"[Prosecutor]: Objection. Hearsay.

"The Court: Sustained.

"[Defense Counsel]: Nothing further."

During a recess, outside the presence of the jury, defendant's trial counsel argued that defendant's statement to the officer about weapons being in the car was admissible

as a party admission. The prosecutor argued that the hearsay exception applies to the admission of a party opponent, e.g. the prosecutor is defendant's opponent. The parties offered no further argument. The trial court said, "All right. My ruling on that stands. The objection remains sustained."

During closing argument, defense counsel conceded that defendant possessed the firearm, but asserted defendant's possession of the gun was "momentary or transitory" for the purpose of "abandon[ing], dispos[ing], or destroy[ing] it."

2. *ANALYSIS*

a) Contentions

Defendant contends the trial court erred by excluding evidence of his statement informing law enforcement of the weapons in the car because the statement was admissible to show defendant's state of mind, in that he did not intend to retain the firearm (Evid. Code, § 1250 [state of mind]).[3] Defendant further asserts the exclusion of the evidence violated his constitutional right of due process and his right to present a defense.

b) State of Mind

"'A trial court's ruling on the admission or exclusion of evidence is reviewed for abuse of discretion.'" (*People v. Sanchez* (2016) 63 Cal.4th 411, 456.) "'[D]iscretion is

[3] The People contend defendant forfeited the evidentiary issue by failing to object on state of mind grounds in the trial court. We choose to address the merits of the contention because it is easily resolved.

abused only when the court exceeds the bounds of reason, all circumstances being considered.'" (*People v. Fuiava* (2012) 53 Cal.4th 622, 650.)

"[E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250.)

Defendant told a law enforcement officer there were weapons inside the car. The location of weapons in a car is not a statement of defendant's state of mind, emotion, or physical sensation. (Evid. Code, § 1250.) Rather, it is a statement about the whereabouts of weapons; there is nothing in the statement describing an aspect of defendant's state of being. Defendant is not a subject of the statement. The statement is about weapons and a car, neither of which is defendant. As a result, the statement is not evidence of defendant's then existing state of mind, emotion, or physical sensation.

Nevertheless, to the extent one could extrapolate that the statement shows defendant wanted to dispose of the firearm, that information is not relevant to defendant's state of mind at the time he received the firearm, hid it, and sat next to it in the car, i.e., the time he possessed it. It might be helpful to show defendant wanted to dispose of the gun upon being stopped by the police—at the time police were about to take control of the firearm—but it is not helpful in determining defendant's intent at the

time he possessed the gun prior to being stopped by law enforcement. In sum, the trial court's ruling was within the bounds of reason.

d) Constitutional Rights

"As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

As explained *ante*, the trial court acted within the bounds of reason by concluding defendant's statement to Officer Rogers was inadmissible hearsay. Thus, the ordinary rules of evidence were applied. Defendant contends the trial court's ruling deprived him of his ability to present a defense because (1) "[i]t was not clear how the gun made its way from the fight into the car," and (2) the evidence would have helped show defendant's state of mind or that his possession of the firearm was transitory.

Contrary to defendant's position, it is clear how the gun arrived in the car. Sulpacio and Delannoy, who were both defense witnesses, testified that Delannoy handed the gun to defendant while defendant was seated in the car. Thus, defendant presented evidence about how, when, and where the gun came to be in his possession. Further, we have explained *ante* that defendant's statement to Officer Rogers was not about defendant. The statement was about weapons being in defendant's car and was not about defendant's state of being. In sum, our review of the record reflects

defendant's right of due process and right to present a defense were not violated by the trial court's evidentiary ruling.

B. JURY INSTRUCTION

1. *PROCEDURAL HISTORY*

The trial court instructed the jury with CALCRIM No. 2511, which concerns possession of a firearm by a felon. The relevant portion of the instruction was given as follows: "If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

"1. He possessed the firearm only for a momentary or transitory period;

"2. He possessed the firearm in order to abandon, destroy, or dispose of it;

"AND

"3. He did not intend to prevent law enforcement officials from seizing the firearm.

"The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, he has not proved this defense."

2. *ANALYSIS*

Defendant contends the trial court incorrectly instructed the jury on the standard of proof for the defense of transitory possession. Defendant contends preponderance of

the evidence is an incorrect standard, and the correct standard is raising a reasonable doubt.

We apply the de novo standard of review. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) In *People v. Mower* (2002) 28 Cal.4th 457 our Supreme Court noted, "Evidence Code section 501 provides that, when a statute allocates the burden of proof to a defendant on any fact relating to his or her guilt, the defendant is required merely to raise a reasonable doubt as to that fact." (*Id* at p. 479.) The court explained the "raise a reasonable doubt" standard applies when the defense "relate[s] to the defendant's guilt or innocence because they relate to an element of the crime in question," typically by negating an element. (*Id.* at p. 480.)

The court further explained, "When a statute allocates the burden of proof to a defendant as to a fact collateral to his or her guilt, however, the defendant may be required to prove that fact by a preponderance of the evidence." (*People v. Mower*, *supra*, 28 Cal.4th at p. 480.) The Supreme Court gave an example of a defense that would require the preponderance of the evidence standard of proof. The example was "momentary handling of a controlled substance for the sole purpose of disposal, against a charge of possession of such a substance." The example came from the case of *People v. Spry* (1997) 58 Cal.App.4th 1345, 1367 through 1369. After giving the foregoing example and one other, the Supreme Court wrote, "Whether either of these defenses properly requires a defendant to prove its underlying facts by a preponderance of the evidence is a question we need not, and do not, reach." (*Mower*, at p. 480, fn. 8.) However, in another case, the Supreme Court wrote, "*Spry* is thus good authority for the

proposition directly considered therein—the allocation of the burden of proof . . . ." (*People v. Martin* (2001) 25 Cal.4th 1180, 1192, fn. 10.)

The elements of the offense of possession of a firearm by a felon are: (1) a prior felony conviction, (2) "ownership or knowing possession, custody, or control of a firearm," and (3) the general intent to possess the firearm. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052; *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417, fn. 3.) The transitory possession defense has two elements: (1) momentary or transitory handling; and (2) an intent to dispose of the item. (*People v. Martin*, *supra*, 25 Cal.4th at p. 1191.)

Once the prosecution has proven the three elements of defendant being a felon, defendant possessing a firearm, and defendant intending to possess the firearm; defendant must then prove two additional elements (1) a temporal element concerning what length of time defendant possessed the item, and (2) defendant's intent to dispose of the item. The elements defendant must establish do not negate possession, negate defendant's status as a felon, or negate defendant's intent to possess the item. Rather, they are additional elements that add information about defendant's possession of the firearm. Because the transitory possession elements are collateral to defendant's guilt, they must be proven by a preponderance of the evidence. Accordingly, the trial court did not err.

Defendant asserts the transitory possession defense is not collateral to guilt because wrongful intent is an element of possession of a firearm by a felon. In *People v. Jeffers* (1996) 41 Cal.App.4th 917, the appellate court wrote, "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. [Citation.] A person who commits a prohibited act 'through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence' has not committed a crime. [Citation.] Thus, a felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922,)

Defendant's reliance on *Jeffers* is not persuasive. In *Jeffers* the trial court had refused the "defendant's pinpoint instruction which provide[d]: [¶] 'When an ex-felon comes into possession of a firearm, without knowing that he has a firearm, and he later learns that he has a firearm, he does not automatically violate Penal Code section 12021(a) upon acquiring knowledge. [¶] The ex-felon violates the law only if he continues to possess the firearm for an unreasonable time, without taking steps to rid himself of the firearm.'" (*People v. Jeffers*, *supra*, 41 Cal.App.4th at pp. 920-921.)

The instant case is not one of constructive possession. The gun was handed directly to defendant. (See *People v. Barnes* (1997) 57 Cal.App.4th 552, 555 [distinguishing actual possession from constructive possession].) Thus, to the extent wrongful intent is an element of constructive possession, it was not an element the prosecutor was required to prove in the instant case. (See generally *People v. Sifuentes*,

supra, 195 Cal.App.4th at p. 1417 [for constructive possession the prosecutor must prove defendant knowingly exercised a right to control the prohibited item].) Therefore, the elements associated with the transitory possession defense were collateral to the elements of defendant's crime, which means the appropriate standard of proof was preponderance of the evidence.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that, if the foregoing two issues concerning the exclusion of evidence and the jury instruction were forfeited for appellate review, then he received ineffective assistance of counsel. We have addressed the merits of both issues and therefore do not address this alternative contention.

D. SECTION 654

1. *PROCEDURAL HISTORY*

During closing argument, when discussing the assault charge, the prosecutor said, "And, of course, in this case, the thing he did was stab a guy three times. So, of course, it's likely to lead to injury, right?" When arguing the attempted manslaughter charge, the prosecutor said, "You don't stab someone three times in the chest unless you're trying to kill him."

When the trial court sentenced defendant, it said, "As to Count 2 [(the assault conviction)], I'm going to sentence the defendant to the upper term of four years in state prison to run concurrent to the sentences imposed in Count 1 [(the manslaughter conviction)]. I have a little bit of a disagreement with Probation. This is one

continuous course of activity in my opinion if you look at the totality of it. And I'm comfortable with running that concurrent."

2. *ANALYSIS*

Defendant contends the trial court erred by not staying the sentence for his assault conviction because the assault conviction and attempted voluntary manslaughter conviction are based upon the same conduct. (§ 654.) The People concede defendant is correct.

Section 654, subdivision (a), provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The prosecutor argued the assault and attempted manslaughter were comprised of the act of stabbing the victim. The trial court found the criminal conduct was part of a "continuous course of activity." There is nothing in the record indicating separate acts or separate victims were involved in the case. Accordingly, the record reflects the two convictions are based upon the same act. Therefore, the trial court erred by not applying section 654. Defendant's sentence for assault (Count 2) should have been stayed.

DISPOSITION

Defendant's sentence for Count 2 is stayed pursuant to section 654. The trial court is directed to amend the abstract of judgment to reflect the stayed sentence on Count 2, and forward a copy of the amended abstract to the Department of Corrections

and Rehabilitation. (Pen. Code, §§ 1213, 1216.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.